

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

DIVISION ORDER 2000 - ⁹⁷ DWR

In the Matter of Wastewater Change Petition #12 (WW-12)
City of San Luis Obispo,
Petitioner

SOURCE: Effluent from the City of San Luis Obispo's Water Reclamation Facility

COUNTY: San Luis Obispo

**ORDER APPROVING CHANGE IN POINT OF DISCHARGE,
PLACE OF USE, AND PURPOSE OF USE TREATED WASTEWATER**

1.0 INTRODUCTION

The City of San Luis Obispo (City) filed Wastewater Change Petition #12 (WW-12) with the State Water Resources Control Board (SWRCB) on September 13, 1991 pursuant to Section 1211 of the California Water Code. WW-12 requests approval to change the point of discharge, place of use, and purpose of use of treated wastewater from the City's Water Reclamation Facility (wastewater treatment plant) located along San Luis Obispo Creek.

2.0 PROJECT DESCRIPTION

The City has recently upgraded its wastewater treatment plant. The City proposes to reduce its current discharge into San Luis Obispo Creek and provide this water to customers in the San Luis Obispo area for irrigation and non-potable uses. The City is also dedicating 1.7 cubic feet per second (cfs) of the discharge to San Luis Obispo Creek per Section 1212 of the Water Code. For a detailed description of the project, see the final Environmental Impact Report (EIR).

3.0 PROTESTS

The Notice of Petition was published on March 10, 1992. Six protests were received (Table 1). The vested rights portions of the Collins and DeVincenzo protests were not accepted since these were based on riparian rights and the treated waste water is foreign in both time and source, making

it available only under appropriation. Five of the protests were dismissed or withdrawn after completion of the EIR process and the biological opinion by the National Marine Fisheries Service (NMFS). The California Department of Fish and Game (DFG or Department) protest was dismissed after the City and the DFG signed a Memorandum of Understanding containing the following stipulations:

1. *City and the Department agree that, pursuant to California Water Code section 1212, they will jointly oppose the Board granting any permit or license to any person or entity other than the City for the appropriation of the effluent discharged from the City's Facility. City shall file a petition with the Board to have San Luis Obispo Creek designated as a fully appropriated stream and will list the amount of 1.7 cfs as included in that portion (sic) the effluent from City's Facility that is not available for appropriation to third parties. The Department shall assist City with such petition.*
2. *City shall modify the fish ladder and brush rack at Marre Dam as described in the Final Environmental Impact Report dated March 1997 for the project ("FEIR"). City and the Department shall cooperate to seek, as needed, access agreements from those private property owners owning land adjacent to Marre Dam. City shall consult with the Department regarding the design and specifications of the modifications to Marre Dam prior to finalizing any plans and specifications for same.*
3. *City and the Department acknowledge that the NMFS Biological Opinion referenced above includes a provision requiring City to create twenty (20) instream pools, which will be approximately 12,000 square feet of pool habitat. This pool habitat may be created on San Luis Obispo Creek or some other creek. City shall consult with the Department in developing its plan for the creation of pool habitat, for the purpose of ensuring that the habitat will also benefit pond turtles. City agrees that the creation of such pool habitat will be done in accordance with the methodology set forth in the California Salmonid Stream Habitat Restoration Manual (DFG, 1998).*

Table 1: Protests against WW-12

Protestant	Basis of Protest	Dismissal Date	Basis of Dismissal/Withdrawal
DFG	Environmental	10/22/99	Conditional Dismissal
Lee & Loreen Collins	Vested Rights	6/1/92	Rejected
	Environmental	10/25/99	Failure to Respond
Avila Valley Advisory Council	Environmental	5/3/97	Withdrawn
John DeVincenzo	Vested Rights	6/1/92	Rejected
	Environmental	10/25/99	Failure to Respond
Central Coast Salmon Enhancement, Inc.	Environmental	10/21/99	Withdrawn
California Sportfishing Protection Alliance	Environmental	6/26/99	Withdrawn

4.0 ENVIRONMENTAL REVIEW

On March 17, 1993, the City circulated a draft EIR. In response to comments on the draft EIR, the City conducted additional studies and circulated a new draft EIR on December 15, 1995. On

November 13, 1996, the U.S. Fish and Wildlife Service (USFWS) released its Biological Opinion and Incidental Take Statement for the project regarding potential impacts to tidewater goby (*Eucyclogobius newberryi*). The Final EIR was released in February of 1997 and was certified by the City Council on March 25, 1997. On July 28, 1999, the NMFS distributed its Biological Opinion and Incidental Take Statement for the project regarding potential impacts to steelhead (*Oncorhynchus mykiss*).

4.0.1 Environmental Impacts Related to a Change in Discharge

The City found that the proposed project may effect the following: water resources, plant and animal life, agriculture, public health, geology, air quality, transportation, land use, aesthetics, utilities, public services and recreation, noise, light and glare, and cultural resources. The factors directly related to approval of the wastewater change petition are those affected by a reduction of discharge into San Luis Obispo Creek. These impacts center on water resources, plant and animal life, and agriculture. The remaining issues are under the jurisdiction of other agencies, and the City has identified mitigation measures to reduce identified impacts to less than significant levels (see pages ES-4 through ES-6 of the Final EIR). The main concern for this project is the effect on southwestern pond turtle, tidewater goby, and steelhead.

4.0.2 Southwestern Pond Turtle

The EIR found that the project could have a negative effect on southwestern pond turtle due to reduced flows and consequently reduced habitat. The Incidental Take permit issued by the NMFS for steelhead trout requires the construction of 20 instream pools in Stenner Creek, Reservoir Canyon Creek, San Luis Obispo Creek upstream of Questa Park, and (or) any other area(s) the NMFS believes would be appropriate. This mitigation should replace southwestern pond turtle habitat that will be affected downstream of the City's discharge point on San Luis Obispo Creek.

4.0.3 Tidewater Goby

The USFWS determined that even with the proposed mitigation, the population of tidewater goby occurring at the mouth of San Luis Obispo Creek may be extirpated by the operation of the project, especially during dry year conditions. As a condition of the Incidental Take Statement for tidewater goby, the USFWS required that "(t)he release of water from the City of San Luis Obispo's water reclamation facility shall not be less than 1.7 cubic feet per second."

4.0.4 Steelhead

The NMFS determined "(t)he project action will eliminate, alter, and reduce the quantity and quality of water, food, space, water velocities, cover/shelter, and passage conditions, through 5.7 miles of San Luis Obispo Creek. The effects of the project action will be confined to emigrating and rearing juvenile steelhead; essential features of critical habitat; spring, summer, and fall of dry years; late spring, summer, and fall of average years; and summer of wet years. Juvenile steelhead are expected to be harmed, injured, or killed, as a result of loss, alteration, and reduction of critical habitat. Effects of the project action on steelhead and critical habitat will be permanent."

The NMFS developed 17 terms and conditions as part of its approval of the Incidental Take Statement for steelhead. The conditions include: a mandatory release schedule of flow of treated wastewater into San Luis Obispo Creek (Table 2); a pool habitat construction plan; a habitat mitigation plan; gradual reduction in release flows; recordation of releases; monitor juvenile steelhead emigration; and monitor steelhead abundance.

Table 2: Minimum discharge requirements as directed by the NMFS

Month	January	February	March	April	May	June	July	August	September	October	November	December
Flow (cfs)	5.0	5.5	5.5	4.4	3.0	1.7	1.7	1.7	1.7	3.8	4.5	4.0

5.0 Findings

The EIR prepared by the City, combined with the biological opinions developed by the USFWS and the NMFS, adequately discussed the environmental relationship of the project. The SWRCB finds that the proposed project will have significant effects on the environment. The California Environmental Quality Act (CEQA) Guidelines, appendix G, state that a project that will substantially affect an endangered, rare, or threatened species of animal or plant or the habitat of the species; or interfere substantially with the movement of any resident or migratory fish or wildlife species, may be deemed to have a significant effect on the environment. Even with the mitigation measures required by the USFWS and the NMFS, there will be a "take" of these species as defined by the federal Endangered Species Act (ESA).

The SWRCB also finds that the petitioned changes do not constitute the initiation of a new right nor operate to the injury of any lawful user of water.

STATEMENT OF OVERRIDING CONSIDERATION

CEQA requires responsible agencies to balance the benefits of a project against its unavoidable environmental risks in determining whether to approve the project. If the benefits of the project outweigh the unavoidable adverse effects, those benefits may be considered "acceptable" (CEQA Guidelines Section 15093(a)). CEQA also requires, however, that where a responsible agency decision allows the occurrence of significant effects that are identified and that are not at least substantially mitigated, the agency shall support in writing the specific reasons for its action based on the final EIR and other information in the record. This required statement is referred to as a Statement of Overriding Considerations.

The SWRCB as responsible agency is proposing to approve a petition to change the point of discharge, purpose of use, and place of use of the City's wastewater treatment plant. The City has certified the EIR. The following adverse impacts of the project are considered significant and unavoidable based on the EIR and the biological opinions of the USFWS and the NMFS:

- The project will have a significant impact of tidewater goby by the possible extirpation of the San Luis Obispo Creek population due to reduced flows in San Luis Obispo Creek, especially during a dry year.

- Juvenile steelhead will be harmed or captured. The NMFS has limited the number of juveniles to be harmed or captured to 500 annually, and one juvenile may be injured or killed.

The SWRCB, having reviewed and considered the information contained in the draft EIRs, final EIR, and biological opinions, finds that even with the mitigation measures identified, significant impacts to the environment will still occur.

The SWRCB finds that the project will enhance the existing water supply and maximize the use of reclaimed water within the City's service area and is consistent with State policy. The SWRCB further finds that existing stream flows in San Luis Obispo Creek as a result of the discharge of treated effluent are unnatural, uncertain, and unpredictable.

The significance of the identified impacts do not outweigh the overriding social, economic, and natural resources considerations which must be balanced by the SWRCB. Further, the federal agencies charged with administering the federal ESA have determined that the amount of "take" anticipated by the project will not jeopardize the continued existence of these species. The SWRCB hereby finds that the benefits associated with proceeding with the project by far outweigh the identified significant impacts to the environment because the project promotes the local and state policies supporting reclamation.

Therefore, the SWRCB finds on the basis of substantial evidence in the record and the findings set forth herein above, that the benefits of, and the need for, the project substantially outweigh the significant environmental impacts identified. The SWRCB hereby adopts the Statement of Overriding Considerations

ORDER

IT IS HEREBY ORDERED THAT:

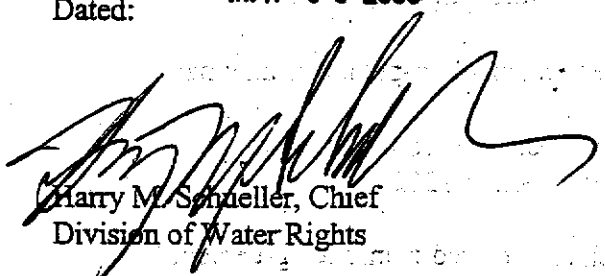
1. The place of use will consist of areas within the city limits of San Luis Obispo for irrigation and other non-potable uses; and, San Luis Obispo Creek for fish and wildlife enhancement. The places of use are shown on maps on file with the Division of Water Rights (Division).
2. The purposes of use are irrigation, fish and wildlife enhancement, and non-potable municipal.
3. The SWRCB recognizes that the City has dedicated 1.7 cubic feet per second of treated wastewater to San Luis Obispo Creek pursuant to Water Code Section 1212.
4. The City shall comply with the following provisions which are derived from the agreement between the City and DFG executed on October 21, 1999 and filed with the SWRCB:
 - (1) Modify the fish ladder and brush rack at Marre Dam as described in the final EIR.
 - (2) Create 20 instream pools, which will be approximately 12,000 square feet of pool habitat on San Luis Obispo Creek or some other creek.

Inclusion in this order of certain provisions of the referenced agreement shall not be construed as disapproval of other provisions of the agreement or as affecting the enforceability, as between the parties, of such other provisions insofar as they are not inconsistent with the terms of this order.

5. The City shall comply with all of the terms and conditions contained in the Biological Opinion and Incidental Take Statement issued by the NMFS on July 28, 1999. The City shall submit any changes to the terms and conditions to the Division. Copies of all reports required by the terms and conditions shall be forwarded to the Division.
6. For the protection of fish and wildlife, the City shall during the period:
 - (a) from January 1 through January 31 discharge a minimum of 5.0 cfs,
 - (b) from February 1 through March 31 discharge a minimum of 5.5 cfs,
 - (c) from April 1 through April 30 discharge a minimum of 4.4 cfs,
 - (d) from May 1 through May 31 discharge a minimum of 3.0 cfs,
 - (e) from June 1 through September 30 discharge a minimum of 1.7 cfs,
 - (f) from October 1 through October 31 discharge a minimum of 3.8 cfs,
 - (g) from November 1 through November 30 discharge a minimum of 4.5 cfs,
 - (h) from December 1 through December 31 discharge a minimum of 4.0 cfs.
7. This order does not authorize any act which results in the taking of a threatened or endangered species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A. sections 1531 to 1544). If a "take" will result from any act authorized under this water right order, the City shall obtain authorization for an incidental take prior to construction or operation of the project. The City shall be responsible for meeting all requirements of the applicable Endangered Species Act for the project authorized under this order.

Dated:

MAY 08 2000


Harry M. Schueller, Chief
Division of Water Rights

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